(1) Supreme Court, U.S.
FILED

No. 041377 APR 12 2005

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ROGER A. BERKE,
Petitioner,

versus

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED FOR REVIEW

The question before this Court is whether the Christian Circuit Court's failure to grant a directed verdict in favor of Petitioner, Roger Alan Berke, on a charge of Tampering with Physical Evidence, Kentucky Revised Statutes (hereinafter KRS) 524.100, violated Petitioner's right to due process, U. S. Const., Amend. XIV, Sec. 1, when the evidence at trial established that:

(1) eighteen (18) photographs introduced at trial, which Petitioner was accused of having attempted to hide from law enforcement authorities, were not in themselves evidence of a crime;

(2) Petitioner moved the said photographs to a safe deposit box following threats from an incarcerated felon who was himself depicted in the photographs and not in response to any real or perceived notice that the said photographs were wanted for use in an official proceeding pursuant to KRS 524.100;

(3) Petitioner made no attempt to hide his identity in renting the safe deposit box.

PARTIES TO THE PROCEEDING

The Petitioner is Roger A. Berke.

The Respondent is the Commonwealth of Kentucky.

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OPINIONS AND ORDERS OF COURTS BELOW

The unreported Order of the Supreme Court of Kentucky denying discretionary review is *Roger Berke v. Commonwealth of Kentucky,* Case No. 2004-SC-775-D, entered January 12, 2005 (Pet. App. 10a). The unreported opinion of the Court of Appeals of Kentucky affirming Petitioner's conviction is *Roger Berke v. Commonwealth of Kentucky,* Case No. 2003-CA-001951-MR, Commonwealth of Kentucky, Court of Appeals, entered August 20, 2004 (Pet App. 5a-9a). The unreported trial court judgment is *Commonwealth of Kentucky v. Roger Alan Berke,* Judgment and Sentence on Plea of Not Guilty (Jury Trial), Indictment No. 02-CR-00280, Commonwealth of Kentucky, Christian Circuit Court, entered September 4, 2003. (Pet. App. 1a-4a).

JURISDICTION

The Order of the Kentucky Supreme Court was entered on January 12, 2005. The jurisdiction of this Court to review this petition for a writ of certiorari is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Amendment XIV, in relevant part provides:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statute § 524.100, entitled "Tampering with Physical Evidence," provides in relevant part:

> A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding.

28 U.S.C. 2106, "Determination," provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

On July 19, 2002, Petitioner was indicted by a grand jury in Christian County, Kentucky, for eighteen counts of violation of Kentucky Revised Statute ("KRS") § 531.310(2)(a), Use of a Minor in a Sexual Performance, and one count of Tampering with Physical Evidence, KRS 524.100. The indictment alleged that between January 1, 1995 and June 9, 1997, Petitioner had employed, consented to or induced "D. M.," later identified as Daniel McCormick, to engage in sexual performances documented by eighteen (18) photographs. The count of Tampering with Physical Evidence alleged that on or about July 15, 2002, Petitioner had committed the said offense when he concealed, removed, or altered physical evidence which he believed was about to be produced or used in an official proceeding, to wit, the eighteen photographs.

The Commonwealth based its Indictment on the eighteen photographs, which graphically depict Daniel McCormick and Petitioner engaged in a variety of sexual

acts. The Commonwealth, and Mr. McCormick, contended that these photographs were taken of Mr. McCormick when he was under eighteen years of age. The record is undisputed that Mr. McCormick first told Kentucky authorities about the photographs while awaiting sentencing on convictions for Escape and Persistent Felony Offender in the Second Degree in Kentucky in June 2002, some six years after the Indictment alleges that the alleged activity took place. Trial Record at 3.

The case was tried on August 4 and 5, 2003, before the Christian Circuit Court, the Honorable John L. Atkins, Judge, presiding. Videotape (hereinafter "Video") 1-B 8/4/03, 11:35:00*ff.*) Respondent, the Commonwealth of Kentucky, presented two witnesses: Daniel McCormick, who was twenty-four years old at the time of trial, and Tennessee Bureau of Investigation Special Agent Jason Wilkerson.

The case was tried under a stipulation that the photographic film, large-format Polaroid "Spectra" film, was manufactured by the Polaroid Corporation over a period extending from March 1997, three months before Mr. McCormick's eighteenth birthday, to June 1997. This was established by reference to the manufacturer's serial numbers on the backs of the photographs. Agent Wilkerson also testified as to the dating process of the film so as to arrive at the dates above.

Respondent introduced the photographs into evidence through Mr. McCormick. Mr. McCormick testified that his date of birth was June 10, 1979, and that he turned eighteen years old on June 10, 1997. Mr. McCormick testified that he could not remember the specific date on which the actual photographs in question were taken, whether they were taken before or after he turned eighteen. (Video at 13:46:44-13:47:17; 13:55:01-13:56:55; 14:07:08-14:13:18). Mr. McCormick did confirm that Petitioner had lived and did own property in both Kentucky and Tennessee.

The photographs themselves were obtained by a search warrant executed by Special Agent Wilkerson in Clarksville, Tennessee, just across the state line. Special Agent Wilkerson testified that the photographs had been found in a bank safety deposit box which had been leased by Petitioner on July 15, 2002, under the name of a former business of Petitioner, although using Petitioner's correct signature. Video at 14:25:01-14:28:27.

At the close of the Commonwealth's case in chief, Petitioner through trial counsel moved for a directed verdict on all charges, without identifying specific grounds for relief. The trial court denied the motion.

Petitioner testified in his own behalf. He admitted to having had a sexual relationship with Mr. McCormick from the time Mr. McCormick was sixteen years of age, but denied that he had taken the photographs prior to Mr. McCormick's eighteenth birthday. Video at 15:08:18. He testified that he did not purchase the camera till 1998, and that the pictures were taken when Mr. McCormick was about twenty years old. Video at 15:15:10-15:20:45. He testified that Mr. McCormick had called him from jail in summer 2002 and told him that he had discussed the photographs with law enforcement. He testified that he had then moved the explicit photographs from a storage unit in Kentucky to a safety deposit box in Tennessee because of frequent break-ins at his properties. He used his ordinary business name to rent the box. Video at 15:15:10-15:20:45. In short, Petitioner's testimony was that he had moved the photographs (instead of burning or otherwise destroying them) because they were at risk, but that he was not aware that they were evidence of a crime.

At no time in either its own or Petitioner's case did Respondent attempt to establish two essential elements of the offense of Tampering with Physical Evidence: (1) belief that the "evidence" is about to be produced or used in the official proceeding; and (2) intent to impair its verity or

availability in the official proceeding. KRS § 524.100(a). At the close of the evidence, Petitioner did not renew his motion for directed verdict.

The jury agreed that the photographs were not in and of themselves evidence of a crime. It acquitted Petitioner of all eighteen counts of use of a minor in a sexual performance. However, it convicted Petitioner of Tampering with Physical Evidence (Pet. App.1a-4a). Petitioner was sentenced to the maximum sentence of five years for this offense on September 4, 2003 (Pet. App. 4a).

Petitioner initially appealed his conviction to the Court of Appeals of Kentucky. His sole argument on direct appeal was that the trial court had committed reversible error by failing to direct a verdict as to the charge of Tampering with Physical Evidence, KRS § 524.100. The Court of Appeals affirmed the conviction (Pet. App. 5a-9a).

The Court of Appeals found that the issue was not adequately preserved for appeal in that Petitioner failed to renew his Motion for Directed Verdict at the close of all the evidence, citing *McDonald v. Commonwealth*, 554 S.W.2d 84 (Ky. 1977) and *Anastasi v. Commonwealth*, 754 S.W.2d 860 (Ky. 1988). Nonetheless, the Court of Appeals went on to discuss the merits of the Appellant's argument (Opinion at 4-5, Pet. App. at 7a-8a).

The Court of Appeals ruled that Petitioner was fully aware: (1) that allegations of criminal conduct had been made against him; (2) that his property was about to be searched; (3) that he had violated a court order [in another case] by traveling to Clarksville, Tennessee, where he leased the safety deposit box at a bank with which he had never before done business; (4) that he attempted to disguise his identity as owner of the leased box; and (5) that he utilized the box to deposit the photographs for safekeeping.

Despite the lack of proof of Petitioner's knowledge or intent, the Court of Appeals found that the jury was rea-

sonably entitled to infer those elements from the evidence, and affirmed (*Id.*).

Petitioner then moved the Supreme Court of Kentucky for discretionary review of the Court of Appeals. Petitioner again argued that the trial court erred in failing to grant a directed verdict on the tampering charge. Petitioner addressed the Court of Appeals' five findings as to the trial court's refusal of a directed verdict as follows.

> (1) and (2): There was no proof from any source at trial that Petitioner was aware that an official investigation had been launched or was about to be launched. All the proof showed was that Daniel McCormick, a felon awaiting sentencing for more felonies, called Petitioner and told him that his house might be searched. Certainly, he could not be considered to be an agent of law enforcement.
>
> (3) Petitioner violated no court order in traveling to Clarksville, Tennessee to open the safety deposit box; in fact, the proof was that he had an account in another bank in Clarksville. The fact is not relevant to any of the elements of KRS 524.100.
>
> (4) Special Agent Wilkerson testified that Petitioner used his own former business name, his name and signature, and his social security number to open the safety deposit box (Video 1-B 8/4/03, 15:05:25).
>
> (5) Respondent did not present any proof on Petitioner's intent in placing the photographs in the safe deposit box. The only proof in this regard was from Petitioner, which was that he wanted to have somewhere to keep the intensely personal and potentially embarrassing photographs—of sex acts between consenting adults—safe and secure.

No federal question was alleged at this level.

On January 12, 2005, the Supreme Court of Kentucky denied discretionary review of Petitioner's case (Pet. App. 10a). This Petition follows.

REASONS FOR GRANTING THE WRIT

Clearly, the constitutional issue presented is raised here for the first time in this case. However, when the record in a case has revealed plain error, this Court has enforced federal constitutional standards despite the petitioner's failure to raise clearly his federal constitutional claim in the court below. See, e.g., *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (reversing a criminal conviction on the basis of a due process claim neither made in constitutional form to the State Supreme Court nor presented by the appellant in his jurisdiction statement to this Court); see also *Wood et al. v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L. Ed. 2d 220 (1981); 28 U.S.C. § 2106. This Court has the power to reach this issue.

The Due Process Clause protects the accused against conviction except "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 365, 90 S.Ct. 1058, 25 L. Ed.2d 338 (1970). Where a judgment is not supported by the evidence, it denies Petitioner substantive due process under the Fourteenth Amendment to the U.S. Constitution. *Winship,* 397 U.S. 358, 90 S.Ct. 1058, 25 L. Ed.2d 338 (1970); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979) (applying *Winship* standard to habeas corpus).

Moreover, Kentucky law is quite clear in recognizing that "insufficient evidence to support a conviction affects substantial (*sic*) due process and amounts to palpable error" under the Kentucky rules of criminal procedure. *Perkins v. Commonwealth*, 694 S.W.2d 721, 722 (Ky. App. 1985), *citing Winship, supra.*

The trial court was clearly erroneous in failing to direct a verdict for Petitioner on the offense of Tampering with Physical Evidence, KRS 524.100. There was no proof adduced at trial either that Petitioner believed Mr. McCormick's threats or that Petitioner intended to make

the photographs unavailable to any investigation. One may note that as a matter of common sense, there are much more effective ways to tamper with physical evidence if that is one's intent.

While it is unclear whether its findings were meant to be the rule of the case or dicta, the Court of Appeals also committed plain error in the findings it made in the section of its opinion addressing the merits of Petitioner's argument. They are refutable by reference to the record, leading to the inescapable conclusion that the Respondent did not meet its burden of proving each element of the offense beyond a reasonable doubt. This Court should grant the writ of certiorari to address the issue of whether the state's failure to prove two elements of a criminal offense beyond a reasonable doubt may be cured by an "inference" to be drawn by the jury, or whether the refusal to grant a directed verdict under such circumstances violates Petitioner's right to due process. U. S. Constitution, Amendment XIV, section 1; *In re Winship*, *supra*.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition and issue a writ of certiorari to the Supreme Court of Kentucky.

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